

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 30648
Issued to: John R. Wood, Jr.

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2199

John R. Wood, Jr.

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 24 July 1978, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, admonished Appellant upon finding him guilty of negligence. The specification found proved alleged that while serving as operator/mate on board M/V BILL FROREICH under authority of the license described above, on or about 27 July 1976, Appellant did negligently navigate such vessel thereby contributing to an allision between the tow of the vessel and a dock located in the vicinity of Mile 14, west of Harvey Locks, Gulf Intracoastal Waterway.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer offered in evidence three exhibits and the testimony of one witness.

In defense, Appellant offered in evidence one exhibit and his own testimony.

It was further stipulated between the parties that the Appellant was in fact the operator of BILL FROREICH on 27 July at the time and place of the alleged allision.

The Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. His order admonished the Appellant for negligently navigating M/V BILL FROREICH as charged.

The decision was served on 1 August 1978. Appeal was timely filed on 9 August 1978 and perfected on 3 January 1979.

FINDINGS OF FACT

At or about 0600, 27 July 1976, M/V BILL FROREICH was underway

in a westerly direction in the Gulf Intracoastal Waterway, pushing 4 barges in tandem, in the vicinity of Mile 14 west of the Harvey Locks. FROREICH is of steel construction, 76 feet long, of 1800 H.P. The barges, each 195 feet long, 35 feet in beam, were empty.

The waterway in this area is only 200 to 300 feet in width and sweeps in a long arc from the Wagner Swing Bridge at about mile 12.5 to a junction with the Barataria Waterway.

Under good daylight weather conditions, the flotilla was being operated solely by Appellant, under authority of his license.

The flotilla approached the bend in the waterway from the east, making six to seven knots over the ground. Efforts by Appellant to contact approaching traffic by means of radio calls elicited no response. Upon proceeding into the bend, Appellant sighted M/V FRANCES TWITTY east bound pushing loaded tank barges. TWITTY had not responded to any of Appellant's radio calls. Appellant's flotilla was within 200 yards of the TWITTY flotilla upon sighting. He sounded whistle signals for a port passage and backed hard on his engines. The flotillas passed without contact, though Appellant's flotilla was set close aboard the north bank by the maneuver and prevailing wind. While in the course of the maneuver, the lead barge of the FROREICH flotilla allided with a wharf on the north bank, and a boat owned by Alphonse Guidry, Jr.

At all relevent times, the Appellant was unaware of the existence of the said wharf and boat.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. Appellant urges two grounds for reversal, to wit:

1. The Administrative Law Judge erred in holding that Appellant is presumed guilty of negligence because his vessel allided with a stationary object, and

2. The record fails to establish the standard of care to which Appellant should be held, and thus no violation of such standard is established by competent evidence.

APPEARANCE: Courtenay, Forstall & Grace of New Orleans, Louisiana, by Thomas J. Grace, Esq.

OPINION

I

The Appellant contends that a presumption of negligence does not apply merely because a vessel operated by him allided with a wharf. Yet Appellant recognizes in his brief substantial case law to the contrary. Brief at 4. Appellant is correct that most cases normally cited for this rule of law have sprung from action by an injured party for damages, lodged against an offending vessel. Considering the rule of Admiralty that a vessel is liable in rem for damages it may cause, it is hardly surprising that case law tends to speak in terms of a presumption "against the moving vessel." The VICTOR, 153 F.2d 200 (5th Cir. 1946). On the practical side however, it may be noted that only in rare instances are vessel underway of their own volition - generally some person or persons exercise control over vessel movements. Thus, in the context of hearings under the authority of R.S. 4450, the presumption arising from an allision may properly be applied against those persons, as it is their competence that is in issue in such proceedings.

The rationale for such a presumption has been well developed by several commentators. J.H. WIGMORE, EVIDENCE, §§2487, 2490-91 (3rd Ed. 1940); see also Decision on Appeal No. 477; Rule 301, Federal Rules of Evidence for United States Courts and Magistrates (1975). The Administrative Law Judge noted that the instant case, with its dearth of witnesses on the events proceeding the allision, is just the situation the presumption was designed to cover. Decision and Order at 12. The applicability of the presumption in R.S. 4450 hearings has been recognized. Decisions on Appeal Nos. 461, 579, 1131 and 1822.

Appellant's reliance on several oil-spill cases, Decisions on Appeal Nos. 2013, 2054 and 2075, is misplaced. Those decisions do not reject the concept of a rebuttable presumption of negligence, they merely hold that "in an R.S. 4450 hearing, evidence indicating only the occurrence of a discharge [of oil] is insufficient to create a presumption of negligence." Decision on Appeal No. 2075, at 5 (emphasis added).

From the record as a whole and Appellant's Brief on Appeal, it is apparent that all parties well understood the effect of a rebuttable presumption of negligence. It is therefore necessary to belabor a well-established evidentiary rule. Appellant attempted to meet his burden by means of his sworn testimony and his exhibit in evidence. It is clear that the Administrative Law Judge, while accepting certain of the Appellant's statements, did not find sufficient weight in Appellant's evidence of his freedom from negligence to rebut the presumption. The assignment of weight to the Appellant's testimony does not evidence any arbitrary or capricious action on the part of the Administrative Law Judge. Absent substantial and credible evidence to the contrary, the

Administrative Law Judge was properly entitled to rely upon the previously created presumption of negligence in finding Appellant guilty.

II

Appellant has also excepted to the Decision & Order of the Administrative Law Judge on the grounds that the record fails to establish the standard of care to which Appellant was held, thus negating any attempt to prove a breach of the standard. Appellant seeks to bolster this line of reasoning with reference to Decision on Appeal No. 2086. At first blush the decision, together with a case cited therein, Decision on Appeal No. 2080, appears persuasive. However a close reading of No. 2086 reveals that significant rebuttal evidence was proffered in that case which supported the conclusion that the Appellant had acted prudently under the circumstances he faced. Thus the presumption raised by the Investigating Officer was overcome by the testimony adduced. It is clear from that decision that no general standard of conduct need be addressed by the Investigating Officer in the event of an allision in order to establish the rebuttable presumption of negligence. Only the specific negligence found by the Administrative Law Judge therein required evidence of a special standard of care. No. 2086 at 5-6. The other decision, No. 2080, is even less persuasive, as therein the only evidence adduced was favorable to the party charged and the issue of presumption does not even exist. Implicit in the presumption operable here is the standard of care to which an operator is held: prudently navigated vessels do not allide with wharfs or moored vessels. Evidence of compliance with the standard might take the form of proof an allision occurred. Such rebuttals do not however, affect the recognized standard of care imposed on an operator to avoid collisions and allisions by prudent seamanship. In the instant case it is manifest that Appellant's efforts in rebuttal were designed to prove he met just such a standard, i.e. that prudent seamanship demanded he avoid the TWITTY flotilla. TR. 73-4 See 46 CFR §5.05-20(2). The failure of the testimony to adequately rebut the presumption does not lessen the recognition of the standard implicit in Appellant's defense.

CONCLUSION

Based on the foregoing discussion and authorities, I find that Appellant failed to rebut the presumption of negligence raised by competent evidence of a reliable and substantial character. For this reason I conclude that the charge and specification have been proved, and, therefore, the order herein must be AFFIRMED.

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana, on 24 July 1978, is AFFIRMED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D. C., this 27TH day of MARCH 19 .

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